

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of the Application of	)	
	)	
HICAP NETWORKS, INC.	)	FCC File Nos. 9507932 and 9600033
	)	
Request for Reinstatement <i>Nunc Pro Tunc</i> and/or	)	
Stay of Processing Action	)	

**ORDER**

**Adopted: April 7, 2000**

**Released: April 10, 2000**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. This *Order* addresses two requests filed by HiCap Networks, Inc. (HiCap) on October 1, 1999<sup>1</sup> to reinstate *nunc pro tunc* the above-captioned applications or, in the alternative, stay the dismissal<sup>2</sup> of the application. For the reasons set forth below, we deny the request.

**II. BACKGROUND**

2. *Harrisburg Application.* On May 24, 1995, two applications filed by WinStar Wireless, Inc. (WinStar) seeking authorization to operate a point-to-point microwave station on the 38.6-40.0 GHz (39 GHz) band in the Harrisburg, Pennsylvania area were placed on public notice.<sup>3</sup> On June 6, 1995, TCO Network Services filed an application seeking authorization to operate a point-to-point microwave station on the 39 GHz band in the Harrisburg, Pennsylvania area.<sup>4</sup> On July 24, 1995, HiCap Networks, Inc. (HiCap) filed an application seeking authorization to operate a point-to-point microwave station on the 39 GHz band in the Harrisburg, Pennsylvania area.<sup>5</sup> On July 25, 1995, No Wire. L.L.C. filed an application for authorization to operate a point-to-point microwave station in the 39 GHz band in the Harrisburg, Pennsylvania area. Each of the applications were mutually exclusive with one another.

<sup>1</sup>See Letter from Walter H. Sonnenfeldt, counsel for HiCap Networks, Inc., to D'wana R. Terry, Chief, Public Safety and Private Wireless Division regarding FCC File No. 9507932 (filed Oct. 1, 1999) (Harrisburg Request); Letter from Walter H. Sonnenfeldt, counsel for HiCap Networks, Inc., to Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division regarding FCC File No. 9600033 (filed Oct. 1, 1999) (Palm Springs Request).

<sup>2</sup>See No Wire, L.L.C., *Order on Reconsideration*, 14 FCC Rcd 15275 (1999) (*Harrisburg Order*); Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to HiCap Networks, Inc. (August 27, 1999) (Palm Springs Dismissal Letter).

<sup>3</sup>FCC File No. 9504888, 9504865. *Public Notice*, Report No. 1136 (rel. May 24, 1995).

<sup>4</sup>FCC File No. 9506013. *Public Notice*, Report No. 1140 (rel. June 21, 1995).

<sup>5</sup>FCC File No. 9507932. *Public Notice*, Report No. 1147 (rel. Aug. 9, 1995).

3. *Palm Springs Application.* On February 15, 1995, an application filed by GHz Equipment Company (GEC) seeking authorization to operate a point-to-point microwave station on the 39 GHz band in the area of Palm Springs, California was placed on public notice.<sup>6</sup> The cut off-date for competing applications was April 17, 1995. On October 2, 1995, HiCap filed an application for authorization to operate a point-to-point microwave station in the 39 GHz band in the area of Palm Springs, California.<sup>7</sup> A portion of the HiCap Palm Springs application sought authorization to operate on facilities in the 39150-39200 MHz band which overlapped with GEC's application. The other portion of the HiCap Palm Springs application sought authorization to operate on facilities in the 39850-39900 MHz band.

4. On December 15, 1995, the Commission suspended the processing of pending mutually exclusive 39 GHz applications and the filing of amendments thereto, pending the outcome of a rulemaking proceeding affecting this service.<sup>8</sup> In a *Report and Order and Second NPRM*, released on November 3, 1997, the Commission stated that it would 1) "dismiss without prejudice all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995," and 2) "dismiss without prejudice all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995."<sup>9</sup> On July 29, 1999, the Commission affirmed its license processing rules in a *Memorandum Opinion and Order* and reiterated that it would "dismiss all amendments, filed on or after December 15, 1995, including those intended to resolve mutual exclusivity among pending 39 GHz applications."<sup>10</sup> The Commission further decided to dismiss as unripe "those applications for which the 30-day public notice period was not completed by the November 13, 1995 Freeze Order" date.<sup>11</sup>

5. On September 8, 1999, the Public Safety and Private Wireless Division (Division) released an *Order* dismissing HiCap's Harrisburg application because it was mutually exclusive with applications filed by WinStar, No Wire and TCO and the mutual exclusivity was not resolved as of December 15, 1995.<sup>12</sup> On October 19, 1999, the Division's Licensing and Technical Analysis Branch (Branch) dismissed HiCap's Palm Springs application.<sup>13</sup> The mutually exclusive portion of the Palm Springs application had

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<sup>6</sup>FCC File No. 9501317. *Public Notice*, Report No. 1122 (rel. Feb. 15, 1995).

<sup>7</sup>FCC File No. 9600033.

<sup>8</sup>Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988-4989 ¶ 123 (1995) (*NPRM and Order*).

<sup>9</sup>See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18605 ¶ 3 (1997) (*Report and Order and Second NPRM*).

<sup>10</sup>Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12440-12448 ¶ 37 (1999) (*July 29 MO&O*).

<sup>11</sup>*Id.* at 12450-12452 ¶ 44.

<sup>12</sup>See *Harrisburg Order*, 14 FCC Rcd at 15277-78 ¶ 6.

<sup>13</sup>Palm Spring Dismissal Letter at 1.

been filed after the sixty-day cut-off period created by the GEC application, thus, pursuant to Section 101.45(b) of the Commission's Rules, it was untimely.<sup>14</sup> The remaining portion of the application was dismissed because that portion had not satisfied the thirty-day public notice requirement as of November 13, 1995.<sup>15</sup>

### III. DISCUSSION

6. HiCap's requests make similar arguments, so we shall address them collectively. HiCap notes that it has filed an appeal seeking judicial review of the Commission's 39 GHz orders.<sup>16</sup> HiCap states that one of the issues in that case is the Commission's treatment regarding the "the rights of applicants to resolve mutual exclusivity conflicts that existed after December 15, 1995."<sup>17</sup> HiCap argues that, given the pendency of an appeal raising issues determinative to the resolution of his application, the application should be reinstated or, in the alternative, the dismissal should be stayed.<sup>18</sup> HiCap contends that granting the requested relief would serve the public interest, convenience and necessity by "eliminating the need for additional duplicative litigation" and helping to "remove uncertainties as to the availability of the subject frequency assignments with respect to the contemplated competitive bidding process."<sup>19</sup>

7. To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.<sup>20</sup> As the Wireless Telecommunications Bureau (Bureau) explained in a recent *Order* denying a motion for stay of dismissals in the 39 GHz band, a vague assertion of irreparable harm is insufficient to justify injunctive relief, as it fails to demonstrate an injury that is "certain and great. . . not theoretical."<sup>21</sup> We are not persuaded that the types of injuries HiCap mentions are sufficient to warrant a stay. Anticipated economic loss "does not, in and of itself, constitute irreparable harm."<sup>22</sup> Likewise, HiCap has not demonstrated that the purported harm is irreparable. In this connection, we note that if it was to prevail in its judicial appeal of the Commission's order regarding the dismissal of the subject application, we anticipate that such relief

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<sup>14</sup>47 C.F.R. § 101.45(b).

<sup>15</sup>Palm Springs Dismissal Letter at 1.

<sup>16</sup>See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999).

<sup>17</sup>See Harrisburg Request at 2; Palm Springs Request at 2.

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) (*Virginia Petroleum*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>21</sup>Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, *Order*, ET Docket No. 95-183, RM-8553, DA 99-2632, ¶ 2 (WTB rel. Nov. 23, 1999) (citation omitted).

<sup>22</sup>*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*); see also *Virginia Petroleum*, 259 F.2d at 925 ("mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

would address the ultimate disposition of the application.<sup>23</sup> Therefore, we find that HiCap has not shown any injury warranting a stay.<sup>24</sup>

8. In addition, we find HiCap's alternate request that we reinstate its applications until its judicial appeal is resolved effectively to be a restatement of his request for a stay, so we deny that request, as well. Moreover, reinstating HiCap's applications would frustrate the goals underlying this proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions."<sup>25</sup> Further, we believe that the Bureau addressed this matter in its November 23, 1999, decision.

#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action for File Number 9507932 filed on October 1, 1999, by HiCap Networks, Inc. IS DENIED.

10. IT IS FURTHER ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action for File Number 9600033 filed on October 1, 1999, by HiCap Networks, Inc. IS DENIED.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>23</sup>See 47 U.S.C. § 402(h).

<sup>24</sup>Where, as here, petitioner fails to show that it will suffer irreparable harm in the absence of injunctive relief, we need not consider the other requirements for a stay. *Wisconsin Gas*, 758 F.2d at 674.

<sup>25</sup>*July 29 MO&O*, 14 FCC Rcd at 12437-38; *Report and Order and Second NPRM*, 12 FCC Rcd at 2917 ¶ 15; *NPRM and Order*, 11 FCC Rcd at 4988-89 ¶¶ 121-124.